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SUPREME COURT, U.S.

80-6701

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

DANIEL ROSS,

Petitioner,

v.

AMOS REED, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BARRY NAKELL
School of Law
University of North Carolina
Chapel Hill, North Carolina
(919) 933-5106

Counsel for Petitioner

QUESTIONS PRESENTED

A. Whether petitioner's failure to challenge on appeal from his pre-Mullaney v. Wilbur state court conviction of second degree murder the trial court's instructions unconstitutionally shifting to him the burden of persuasion on the issues of malice and self-defense worked a forfeiture of his right to raise the issue on federal habeas corpus.

B. Whether petitioner was denied effective assistance of counsel on appeal from his pre-Mullaney v. Wilbur state court conviction of second degree murder because his attorney failed at that time to raise the issue of the trial court's instructions shifting to him the burden of persuasion on the issues of malice and self-defense.

C. If the failure to raise a due process violation on appeal from a state court conviction generally precludes raising the issue on federal habeas corpus, whether petitioner's case meets the cause and prejudice exception to such a procedural bar.

D. Whether the state appellate court decided the merits of the due process issue even though petitioner did not expressly raise it so that there is no state procedural bar to its federal habeas corpus review.

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OPINIONS BELOW

The opinion of the Court of Appeals is unpublished and is reproduced as Appendix A. The Order and Judgment of the District Court are not reported and are reproduced as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on April 1, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the Constitution provides as follows: "(N)or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Petitioner Daniel Ross was convicted at the March 17, 1969 Session of the Wake County Superior Court, after a jury trial, of second degree murder in the killing of his wife. At his trial, Ross raised the defense of self-defense and the partial defense of lack of malice. The trial court instructed the jury that Ross had the burden of proving both defenses.[1]

Ross appealed his conviction to the North Carolina Supreme Court, which affirmed it on October 15, 1969. State v. Ross, 275 N.C. 550, 169 S.E. 2d 875 (1969). Although Ross did not expressly challenge on his appeal -- which was decided more than five and one-half years before this Court's decision in Mullaney v. Wilbur, 421 U.S. 684 (1975) -- the constitutionality of the instructions imposing the burden of proof on him, the State Supreme Court held that the trial "court charged fully and correctly on the burden and intensity of the proof required to support each of the permissible verdicts of guilty . . . ." 275 N.C. at 554, 169 S.E. 2d at 878.

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[1] The District Court, referring to page 51 of the Record on Ross' Appeal, stated that "the trial judge departed from the then customary charge and instructed the jury that the state had the burden to satisfy the jury beyond a reasonable doubt that the killing had not been in self-defense." The trial court, however, expressly told the jury, at pages 42 and 50 of the Record on Ross' Appeal, that the burden of proof on self-defense was on Ross. The point is not critical, however, because the District Court agreed that the trial court unconstitutionally imposed on Ross the burden of proof on lack of malice.

Thereafter this Court filed its opinion in Mullaney v. Wilbur, 421 U.S. 684 (1975). On June 17, 1977, this Court held in Hankerson v. North Carolina, 432 U.S. 233 (1977), that Mullaney applies retroactively, contrary to the decision of the North Carolina Supreme Court in State v. Hankerson, 288 N.C. 632, 220 S.E.2d 575 (1975).

On December 2, 1977, Petitioner filed in the Superior Court a Petition for a Writ of Post-Conviction Review in which he challenged his conviction on the ground that it was obtained in violation of due process because the burden of proof on the issues of self-defense and lack of malice were unconstitutionally imposed upon him, relying upon Mullaney and Hankerson. On December 29, 1977, the Superior Court entered an Order denying that Petition. On January 9, 1979, Petitioner filed a Petition for Certiorari seeking review of that decision in the North Carolina Court of Appeals. By order of February 23, 1978, that Court denied the Petition.

Petitioner promptly filed a Petition for a Writ of Habeas Corpus in the United States Court for the Eastern District of North Carolina, raising the same issues. The District Court stayed the action pending the Fourt Circuit's en banc decision in Cole v. Stevenson, 620 F.2d 1055 (4th Cir.), cert. Den., 101 S. Ct. 545 (1980). On October 21, 1980, after Cole was decided by a 6-3 vote and this Court denied certiorari with three Justices voting to grant, the District Court dismissed the Petition. Petitioner timely appealed to the United States Court of Appeals, which summarily dismissed the appeal on April 1, 1981.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE HOLDING IN THIS COURT'S DECISION IN FAY v. NOIA AND RAISES THE IMPORTANT QUESTION OF THE CONTINUING VALIDITY OF THAT HOLDING.

The issues presented in this case involve the continuing validity of this Court's landmark precedent in Fay v. Noia, 372 U.S. 391 (1963), and arise as a result of this Court's decision in Wainwright v. Sykes, 433 U.S. 72 (1977). See also, Francis v. Henderson, 425 U.S. 536 (1976); Davis v. United States, 411 U.S. 233 (1973). They involve the questions of whether the rule of Wainwright v. Sykes as to the federal habeas corpus effect of a failure to comply with a state

contemporaneous objection rule at trial applies also to modify the Fay v. Noia direct holding regarding the federal habeas corpus effect of a non-deliberate failure to raise an issue on a state appeal, and, if so, of the meaning of the new "cause and prejudice" standard. The Fourth Circuit, by a 6-3 vote of the Court sitting en banc in Cole v. Stevenson, supra, held that this Court overruled Fay v. Noia in footnote 8 in Hankerson, even though six days after deciding Hankerson it expressly declared that "we leave for another day" the question of the continuing validity of Fay v. Noia. Wainwright v. Sykes, supra at 88 n.12. Three Justices voted to grant certiorari in Cole.

In Fay v. Noia, this Court held that a state criminal defendant's failure to appeal from his conviction -- as long as it was not a deliberate by-pass of state remedies -- was not a bar to federal post-conviction review.

In the present case, Petitioner did not incur any procedural defaults at trial, and he did appeal his conviction in the state courts. His appeal was completed more than five years before this Court announced its decision in Mullaney v. Wilbur, however, and Petitioner did not then expressly raise the issue that was later settled in Mullaney. As Chief Judge Haynsworth recognized in his dissenting opinion in Cole, "Fay's holding squarely fits this case" and provides that the federal courts should entertain Petitioner's habeas corpus action. 620 F.2d at 1074.

It is clear that any effort by Petitioner to have raised the issue on his pre-Mullaney appeal would have been futile. After Petitioner's conviction had been affirmed the North Carolina Supreme Court rejected similar arguments in other cases. State v. Sparks, 285 N.C. 631, 643, 207 S.E.2d 712, 719 (1974); State v. Harris, 23 N.C. App. 77, 80, 208 S.E.2d 266, 268 (1974). Moreover, after Mullaney was decided the North Carolina Supreme Court held that it did not apply retroactively. State v. Hankerson, 288 N.C. 632, 220 S.E.2d 575 (1975), rev'd, 432 U.S. 233 (1977). Thus, the State is insisting in Petitioner's case on a futile formality. Yet, as this Court recently held: "The law does not require the doing of a futile act." Ohio v. Robert, 100 S.Ct. 2531, 2543 (1980).

Indeed, the North Carolina Supreme Court on its own motion did in fact pass upon the adequacy of the burden of proof instructions. In rejecting that contention, the District Court focused only on one sentence in which the North Carolina Supreme Court said: "The court charged fully and correctly on the burden and intensity of the proof required to support each of the verdicts of guilty." State v. Ross, 275 N.C. 550, 554, 169 S.E.2d 875, 878, (1969).

The District Court overlooked the following sentence: "While the defendant did not point out and assign as error any particular or designated portion of the charge as required by appellate rules, we have examined the charge and conclude it is in accordance with legal requirements and is unobjectionable." Id. Because the State Supreme Court thus denied Petitioner's appeal on this issue on the merits and not on the basis of a procedural default, there is no state procedural bar to its federal court review on habeas corpus. County Court of Ulster County v. Allen, 442 U.S. 140, 154 (1979). See also, Wynn v. Mahoney, 600 F.2d 448, 450 n.1 (4th Cir.), cert. den., 100 S. Ct. 423 (1979). ("We have no occasion to decide the Wainwright question since North Carolina explicitly waived that point in oral argument of this appeal.")

II.

THE DECISION BELOW IS IN CONFLICT WITH THE DECISIONS OF TWO OTHER CIRCUITS HOLDING THAT EVEN IF FAILURE TO COMPLY WITH A STATE RULE REQUIRING ISSUES TO BE RAISED ON APPEAL WERE GENERALLY TO CONSTITUTE A BAR TO FEDERAL HABEAS CORPUS, THE CIRCUMSTANCES OF THIS CASE MEET THE "CAUSE AND PREJUDICE" EXCEPTION TO SUCH A BAR.

This Court has recognized an exception to the federal forfeiture consequence of a state procedural lapse even where it has generally permitted the forfeiture. In Francis v. Henderson the Court said simply that the exception requires a showing of cause for the state procedural failure and "also a showing of actual prejudice." 425 U.S. at 542. In Wainwright v. Sykes, the Court noted:

> The 'cause'-and -'prejudice' exception of the Francis rule will afford an adequate guarantee, we think that the rule will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice."

433 U.S. at 90-91. The Court said that "precise content may be given those terms by later cases." Id. at 91. This case presents the Court an occasion to elaborate on that standard, and thereby to give needed guidance to the lower courts in its application.

There was good cause for petitioner's failure to raise the issue on appeal because there was not yet an authoritative judicial decision recognizing the

validity of the issue. Petitioner did appeal on other grounds so it is evident that he was not deliberately avoiding the issue.

In O'Connor v. Ohio, 385 U.S. 92 (1966), the defendant contended "that the prosecutor's comment upon his failure to testify during his trial for larceny violated the constitutional right to remain silent." Id. at 92. He relied on Griffin v. California, 390 U.S. 609 (1965), which was decided after the defendant had exhausted his state appeals without raising the issue and was seeking review in the United States Supreme Court. This Court held "that in these circumstances the failure to object in the state courts cannot bar the Petitioner from asserting this federal right . . . . Defendants can no more be charged with anticipating the Griffin decision than can the States. . . . Thus, his failure to object to a practice which Ohio had long allowed cannot strip him of his right to attack the practice following its invalidation by this Court." Id. at 93. Cf., Owen v. City of Independence, 100 S. Ct. 1398, 1419 (1980) (Powell, J., with Burger, C.J., Stewart and Rehnquist, J.J., dissenting).

The prejudice requirement is also satisfied in this case. Prejudice flows from the erroneous standard of proof imposed on the jury's decision regarding the instructions on both malice and self-defense. The constitutionally erroneous instruction by the trial court "'raises serious questions about the accuracy'" of the jury's verdict. Hankerson v. North Carolina, supra at 243. As this Court held in Hankerson, "We do not . . . readily assume that juries fail to understand the instructions they have been receiving in North Carolina." Hankerson v. North Carolina, supra at 244 n.8.

The decision below is in direct conflict with recent decisions of the Fifth and District of Columbia circuits. In Tyler v. Phelps, 622 F.2d 172 (5th Cir. 1980), and United States v. Frady, 631 F.2d 506 (D.C. Cir. 1980),

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* In the Hankerson case itself, Hankerson did not raise the Mullaney issue on appeal to the State Court of Appeals, in his appeal papers to the North Carolina Supreme Court, or in his brief in the North Carolina Supreme Court. Three weeks after Mullaney was decided, Hankerson moved to amend the record to raise the Mullaney issue. The North Carolina Supreme Court granted that motion only eight days before oral argument in the case.

See also, State v. Hancock, No. 105 PC (N.C. Supreme Court, Nov. 30, 1978). In Hancock, the North Carolina Supreme Court awarded post-conviction relief on Mullaney grounds. In his appeal to the North Carolina Court of Appeals Hancock did not raise that issue even though Mullaney was decided while the appeal was pending. He tried to appeal further to the North Carolina Supreme Court and to raise the issue at that stage, still, like Hankerson, too late under the letter of the North Carolina rules. The North Carolina Supreme Court dismissed the appeal. A copy of its later order nevertheless granting post-conviction relief is attached as Exhibit C.

Those circuits held that "cause" for the failure to comply with a rule requiring a contemporaneous objection to jury instructions is satisfied if the defense attorney did not object because he was unaware of the grounds for doing so -- especially where the law establishing those grounds had not yet been decided. In Phelps, the Fifth Circuit held:

> "Though 'cause' was undefined in the Sykes opinion, subsequent decisions have given meaning to the term. Several courts have indicated that ineffective counsel short of that necessary to make out a Sixth Amendment claim, will satisfy the 'cause' prong. See Collins v. Auger, 577 F.2d 1107, 1110 n.2 (8th Cir. 1978) (dictum), cert. denied, 439 U.S. 1133 (1979); Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974 (1979). Jimenez v. Estelle, 557 F.2d 506, 511 (5th Cir. 1977) (dictum). We agree with the sentiment expressed in Collins v. Auger . . . that a lack of knowledge by trial counsel that the actions of the trial judge constituted a due process violation is sufficient cause for failure to object.[7]
>
> "We find this definition of the 'cause' element of Sykes to be completely consistent with the policies stated by the Sykes court. By not binding a defendant to obvious mistakes by his trial counsel we are not permitting counsel to sandbag, but only giving relief to defendants when the erroneous, nontactical decisions by counsel result in prejudice."
>
> Footnote 7: "In United States v. Brown, (D.C. Cir. 1980) (48 U.S.L.W. 2698) in the context of discussing the 'cause' prong of Rule 12, Fed. R. Crim. P., the court stated:
>
> > "'Even when counsel's performance is generally competent, however, he may, through oversight or ignorance, fail to present a substantial constitutional claim. Binding a defendant to the materially deficient judgment of his attorney would be a senseless penalty in most cases because most defendants lack the legal sophistication to monitor their attorney's performance.'"

622 F.2d at 172. Frady was a federal, not a state case. Otherwise, it is squarely on point with the present case because it too involved the application of a new decision after the defendant's trial holding that the instructions given at the trial, without objection, were erroneous. The Court ruled:

> "At the time of his trial, the erroneous instructions were standard. Thus, appellant's counsel had every right to assume that any objection to the instructions would have been futile. To rule otherwise would be to suggest that trial counsel should object to all jury instructions in anticipation of changes in the constitutionality of jury instructions. Such a suggestion borders on the absurd."

636 F.2d at 512. Of course, in the present case, petitioner's attorney did not in fact anticipate the Mullaney decision. See also, Gardner v. Florida, 430 U.C. 349, 361 (1977):

> "Nor do we regard this omission by counsel [the failure to request access to the full pre-sentence report] as an effective waiver of the constitutional error in the record. . . . (T)here is no basis for presuming that the defendant himself made a knowing and intelligent waiver, or that counsel could possibly have made a tactical decision not to examine the full report."

CONCLUSION

Like most federal habeas corpus actions since Stone v. Powell, 428 U.S. 465 (1976), the present case raises issues that involve the factual integrity of the adjudication of guilt in the state court. Although petitioner was concededly convicted at an unfair trial in which due process violations substantially impaired the truth-finding process, the Court of Appeals held that his conviction should be upheld simply because he did not raise the issue on appeal, even though he did appeal and even though he did raise the issue in the state courts as soon as this Court decided Mullaney and held that it applied to his trial. That decision is contrary to the holding of Fay v. Noia, and is not supported by any federally cognizable policy or any legitimate state interest.

For the foregoing reasons, petitioner respectfully requests that the Court issue a writ of certiorari to review the judgment of the Fourth Circuit.

Respectfully submitted,

Barry Nakell

Barry Nakell

School of Law
University of North Carolina
Chapel Hill, North Carolina
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that I have served one copy of the foregoing Petition for Writ of Certiorari and Motion for Leave to Proceed in Forma Pauperis, by mailing them, first class postage prepaid, addressed as follows:

Mr. Richard N. League
Assistant Attorney General
P.O. Box 629
Raleigh, N.C. 27602

Date: May 19, 1981

Barry Nakell
Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

DANIEL ROSS,

Petitioner,

vs.

AMOS REED, etc., et al.,

Respondents.

No. 78-62-HC

O R D E R

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This petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is before the court for a ruling after having been stayed pending the Fourth Circuit's decision in Cole v. Stevenson, 620 F.2d 1055 (4th Cir. 1980). After Cole the parties were ordered to file written arguments applying the Cole opinion to this case. The parties have so responded and the case is now ripe for decision.

Petitioner Ross was convicted of first-degree murder in 1968. On direct appeal he excepted to certain aspects of the trial judge's charge to the jury. In his Assignment No. 9, he contended that the trial court should have charged the jury as to the law of involuntary manslaughter. In his Assignment No. 10, he contended that the court did not properly define self-defense. (Record on Appeal to N. C. Supreme Court, p. 57). He did not except to that portion of the charge where the judge placed upon the defendant the burden to rebut a presumption that an intentional killing is done unlawfully and with malice. (Record on Appeal, p. 42.) Furthermore, the trial judge departed from the then customary charge and instructed the jury that the state had the burden to satisfy the jury beyond a reasonable doubt that the killing had not been in self-defense. (Record on Appeal, p. 51.) In considering petitioner Ross' appeal of jury instruction errors, the North Carolina Supreme Court stated: "The court charged fully and correctly on the burden and intensity of the proof required to support each of the permissible verdicts of guilty; and that the failure of the state to carry the burden required a verdict of not guilty." State v. Ross, 275 N.C. 550, 554, 169 S.E.2d 875 (1969).

EXHIBIT A

Ross contends that these assignments of error adequately raised the Mullaney issues on his direct appeal to permit him to avoid the procedural default bar announced in Cole. It is clear from the record, however, that he did not clearly present the Mullaney issues as required by the North Carolina Supreme Court Rule 19 (3). See, e.g., State v. Jackson, 284 N.C. 383, 200 S.E.2d 596 (1973), motion for reconsideration denied, 293 N.C. 260, 247 S.E. 2d 234 (1977). The issue presented is whether the North Carolina Supreme Court, by addressing Ross' contentions in such a broad fashion, waived its own rule and considered the Mullaney issue sua sponte.

The North Carolina Supreme Court has at times waived its rule that asserted errors be clearly presented and has proceeded to the merits of asserted errors in jury instructions where those errors had not been clearly presented. E.g., State v. Freeman, 295 N.C. 210, 244 S.E.2d 680 (1978); State v. Rigsbee, 285 N.C. 708, 208 S.E.2d 670 (1974). In such cases the Supreme Court's waiver is explicitly acknowledged. In the present case the Supreme Court did not explicitly waive its rule and cannot reasonably be said to have actually considered the Mullaney issue despite the broad language of the holding.

Accordingly, plaintiff's motion to file exhibits is granted, defendant's motion to dismiss is granted, and this action is hereby dismissed.

SO ORDERED.

F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

October 21, 1980.

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 80-8344

Daniel Ross,

Appellant,

v.

Amos Reed, etc. and
Attorney General of the
State of North Carolina,

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. F. T. Dupree, Jr., District Judge.

Submitted: January 27, 1981 Decided: April 1, 1981

Before HAYNSWORTH, Chief Judge; WINTER and ERVIN, Circuit Judges.

(Daniel Ross, Appellant Pro Se. Richard N. League, Assistant Attorney General, for the Appellees.)

EXHIBIT B

PER CURIAM:

A review of the record and the district court's opinion discloses that an appeal from its order refusing habeas corpus relief pursuant to 28 U.S.C. § 2254 would be without merit. Because the dispositive issues recently have been decided authoritatively, we deny a certificate of probable cause to appeal, dispense with oral argument, and dismiss the appeal on the reasoning of the district court. Ross v. Reed, C/A No. 78-62-HC (E.D.N.C., Oct. 22, 1980).

DISMISSED.

No. 105 PC

TWENTY-SECOND DISTRICT
DAVIDSON COUNTY

SUPREME COURT OF NORTH CAROLINA

Fall Term 1978

* * * * * * * * * * * * * * * * *

STATE OF NORTH CAROLINA	)	
	)	ORDER AWARDING NEW TRIAL
v	)	UPON DEFENDANT'S PETITION
	)	FOR FURTHER REVIEW
BILLY LEE HANCOCK	)	

Defendant petitioned Davidson Superior Court for post-conviction relief on the ground that at his trial for second degree murder at the 17 March 1975 session of that court the trial court unconstitutionally placed the burden of proving the absence of malice in order to reduce his crime to manslaughter, and self-defense in order to excuse it altogether upon the defendant. From a denial of this petition defendant applied for a writ of certiorari to the Court of Appeals which was likewise denied on 9 October 1978. He petitions us for further review of that denial.

The issue of self-defense was properly presented at defendant's trial. The trial judge in his jury instructions placed the burden of proving this defense upon the defendant. Although defendant did not assign this as error in his appeal to the Court of Appeals, which found no error in his trial, State v. Hancock, 28 N.C. App. 149, 220 S.E. 2d 167 (17 December 1975), defendant did seek to appeal to this Court on the ground, among others, that the jury instructions in his trial violated Mullaney v. Wilbur, 421 U.S. 684 (9 June 1975) as interpreted in State v. Hankerson, 288 N.C. 632, 220 S.E. 2d 575 (17 December 1975). Having determined in Hankerson that the Mullaney rule was not retroactive, we allowed the state's motion to dismiss defendant's appeal. In Hankerson v. North Carolina, 432 U.S. 233 (1977), the United States Supreme Court determined that we had erred in declining to hold the Mullaney rule fully retroactive.

EXHIBIT C

Inasmuch, therefore, as defendant did seek to raise on direct appeal to this Court, and before the judgment against him was final, the question of the constitutionality of the trial judge's instruction placing the burden on defendant to prove self-defense and the Court being of the opinion that in light of Mullaney v. Wilbur, supra, and Hankerson v. North Carolina, supra, his appeal on that ground should have been allowed and defendant awarded a new trial, the Court having permitted the defendant Hankerson to raise the same question for the first time in this Court, State v. Hankerson, supra, now, therefore, it is

ORDERED by the Court in conference that defendant's petition for further review be allowed for the sole purpose of further ordering that defendant be and he is hereby awarded a new trial. See orders earlier entered in various cases at 293 N.C. 259-263 (1977).

This the 29th day of November, 1978.

For the Court

The foregoing order is issued over my hand and the seal of the Supreme Court this 30th day of November, 1978.

John R. Morgan
Clerk of the Supreme Court
of North Carolina

cc: North Carolina Court of Appeals
Mr. Charles F. Lambeth, Jr., Attorney at Law
Ms. Kaye R. Webb, Associate Attorney
Mr. Hugh Shepherd, Clerk of Superior Court
Mr. H. W. Zimmerman, Jr., District Attorney

A TRUE COPY
JOHN R. MORGAN
CLERK OF THE SUPREME COURT
OF NORTH CAROLINA
DEPUTY CLERK
November 30, 19 78